Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 09-880

In THE

Supreme Court of The United States

CHARLES W. BIRKS,
Petitioner, *pro se,*

v

KEITH F. PARK, Esquire , COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP , REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents

On Petition for Rehearing to The Supreme Court of The United States

Argument Supporting Rehearing of Docket No. 09-880

Prepared by litigant, *pro se*
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Walton, West Virginia 25286
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Questions Presented for Review

1. Will this Supreme Court enforce mandatory requirements of the Federal Rules of Evidence (cited in the original petition) on the courts of the U.S 5th Circuit ?

2 Will this Supreme Court take notice that The Private Securities Litigation Reform Act (P.S L.R.A.) at §78u-4(a)(4) , paragraph 4, was referenced and incorporated into paragraph 2, §78u-4(a)(2), as therein defines a Lead-Plaintiff's knowledge of terms and obligations of service via Sworn Certificate ?

3. Will this Supreme Court recognize that an anti-reform-law agenda has been described to this case, as creates a purposeful distraction of Federal Court duty, in order to withdraw an axiom of law doctrine, as regards the courts-of-equity prohibition to enjoin future law-violations ? Further, that such lower court withdrawal from this Supreme Court's own endorsement of the axiom seeks to corrupt class-action court-process to gain unlawful benefits for lead-plaintiffs outside the "share and share alike" provisions of reform-law ?

Corporate Disclosure Statement

Petitioner makes the following disclosure

1 Is party a publicly held corporation or other publicly held entity? NO

2 Does party have any parent corporations? NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations

3 Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? NO

If yes, identify all such owners

4 Is party a trade association? NO

If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member

5 Does this case arise out of a bankruptcy proceeding? NO

If yes, identify any trustee and the members of any creditors 'committee

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3 New York Times v United States, at page 744 in 403 U S 713 (1971) :

"It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime *See* Z Chafee & E Re, Equity 935-954 (5th ed.1967),1 H Joyce, Injunctions §§ 580a (1909) "

4 Owen v City of Independence, at page 657 in 445 U S. 622 (1980) :

"The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy "

Citation List of Opinions and Orders to the Case

Because this is a Petition for Rehearing there is but one addition to the list of Opinions and Orders.

23. March 29, 2010 Order of the Supreme Court of the U S. as Denied Petition for Writ of Certiorari (docket no. 09-880)

The complete listing of items 1-23 is found in the attached Appendix at Section B

Jurisdiction Statement

Plaintiff makes this Petition for Rehearing in exercise of Supreme Court Rule 44 and by Statute authority following in a line from U S District Court, Southern District of Texas, Houston Division (Texas Court) by exercise of 28 U S C 1294(1) to U.S. Court of Appeals for The Fifth Circuit (5th Circuit Court) and from a U S Court of Appeals by exercise of 28 U S C 1651(a) and possibly (b) to this Supreme Court of The United States in original Petition for Writ of Certiorari to The U S Court of Appeals for the Fifth Circuit

Cites to Constitutional Provisions, Statutes, and Regulations Involved in the Case

No new cites pertinent to Rehearing

Statement of the Case (revised)

Within the Dynegy Securities Litigation, a class-action, a 2005 settlement of class claims was presided over by a court of the U S District Court Southern District of Texas, Houston Division (Texas Court), a number of anomalies exist which are shown to be violations of federal law The court-appointed class-representatives were these Defendants/Appellees Petitioner was a class-member

As part of the consideration which induced Lead-Plaintiff (Regents) to settle the litigation was agreement that two positions on the Dynegy Board of Directors would be chosen from nominees selected by the Regents and two of those nominated would be specifically accepted onto the Board by Dynegy. That power and control was not time-limited That power and control merged the interests of the Regents with the interests of the Dynegy Corporation and was against the interests of the class That power and control consideration was not published to the class and was only found within the Settlement Stipulation, a document encrypted by the court's use of proprietary software (as required technology access, for viewing, and the acceptance of End User License Agreement from Adobe Systems specifically agreeing to potential computer system dysfunctions). The court's use of that technology was not objected by class-representatives and no other effort to disclose settlement-terms was made

Plaintiff contends : it was unreasonable to conceal the terms of the settlement from the class; it was unreasonable to require acceptance of dysfunctional software, and; it was unreasonable to expect any class to read a remote stipulation approved by a Court with an eye toward discovery of unlawful actions by either the court or class-representatives

Because that settlement was not timely-discovered as flawed, it passed into finality As shown, those flaws were concealed through other complex machinations to prevent discovery This case was never made against the settlement or the presiding Texas Court This case is made against the unlawful behaviors of the Defendants who benefitted from violation of Federal Law

The Private Securities Litigation Reform Act (P S L R A) at §78u-4(a)(4) (as paragraph 4) precisely forbids court discretion from granting "any settlement" (consideration) which is not shared pro-rata (per share basis) with the class Such defines "fairness" in reformed class-action law; and, by limiting court discretion, supercedes a court pronouncement of fairness under Federal Rules of Civil Procedure Rule 23 (specifically 23(a)(4))

A conflict-of-interest was first engaged within class-representatives' negotiation for unshared control over Board of Director's Seats That negotiation used valuable class-time that was to be spent seeking equitable recovery for the entire class Plaintiff also contends a conflict-of-interest by representatives is fraud.

In P S L R.A at §78u-4(a)(2)(A) is the requirement of "Sworn Certificate" as a public assurance that the reformed-law and its provisions would be honored by the would-be Lead-Plaintiff, Regents The Lead-Counsel is likewise bound by the Regents' certification to represent the class because that legal representation is directed by Lead-Plaintiff

Within those provisions at §78u-4(a)(2)(A)(iii) is agreement of "willing[ness]" to serve as a representative-party on behalf of a class" Such representation necessarily must be lawful to be of service to the class.

Within those provisions at §78u-4(a)(2)(A)(vi) is agreement "plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery," That provision, within that same paragraph 2, describing representative's terms of obligation, refers to and incorporates paragraph 4, §78u-4(a)(4) (described above), as defines the restriction to court discretion, and, so , what is legitimate for class-representatives to bargain for in a settlement is within the terms specific to class-representation

Plaintiff further contends the unshared consideration to power and control is a form of valuable consideration, was specifically outside the court's discretion to even grant, and, such class-representation is necessarily rendered unlawful by P S L.R.A reform-law provisions Therefore, such class-representation as was committed through a variety of behavioral anomalies within the Dynegy

Securities Litigation settlement are behaviors of fraud and malpractice as alleged

The negotiation and acceptance of the settlement on terms that granted benefit to the power and control over two positions on the Dynegy Board of Director's is admitted by Defendants Petitioner had calculated the value of those two Directors' Seats for the courts at 339 Million Dollars

Plaintiff maintains contention that such value induced settlement to occur, caused that unfair and unlawful merging of interests against the class' interests, and reduced the shared-portion of recovery for the class

Direct Argument Supporting Grant of Rehearing

This Petition for Rehearing is made within the context of S Ct Rule 44 to the best of my understanding. Within the confinement of such petition to ".. intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.", the following individual issues seem both substantial and controlling :

1 Excessive Process

As per S.Ct Rule 10(a) the decisions of the 5th Circuit Court of Appeals to deny this Plaintiff's Appeal has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an

exercise of this Court's supervisory power The 5th Circuit refusal to recognize the existence of a federal law as a judgment factor and make proper Judicial Notice under MANDATORY Federal Rules of Evidence (F.R E) Rules (cited) is without question such a departure and has evidently been overlooked by this Supreme Court

The effect of that departure seeks to complete not only an anti-reform-law agenda in defiance of the specific Private Securities Litigation Reform Act (P S L.R.A) law provisions cited (that were intended to protect class interests from conflicts-of-interest by a Lead-Plaintiff) , and, also, effectively removes the courts of the 5th Circuit from uniform application of the F R E A Supreme Court failure to cause an opinion in explanation regarding that Judicial Notice to actually be issued repudiates the mandatory F R E requirement applicable to U S Courts of Appeals

The further effect of failure to grant Certiorari is, thereby, one of this Supreme Court fixing the departure from accepted and usual Rules by the 5th Circuit after-the-facts of both the Judicial Notice requirement first being breached and the controlling P.S L.R.A. law provisions thus evaded Such a final solution dissolves all opportunities of The People to timely application within the lower courts of those laws established by Congress and endorsed by The Executive To, thereby, burden Plaintiffs with appeals to ever-higher courts and so clutter dockets through the delay in application or non-application of the laws or rules levies an excessive process As inexperienced, this Petitioner has no way to evaluate if that "excessive process" is

the present state of "accepted and usual judicial proceedings"and can only hope that such is not present in this court's opinion. However, it is axiomatic that, in judicial processes , abiding by rules and laws is the accepted and usual course of proceedings

2. Will of The People/Inadequate Process

In the Supplemental Appendix filed with the Petition, The Texas Court dismissal of the case is based on a Defendants' Rule 12(c) Motion that requires a presupposition that Plaintiff has described the truth and that for one reason or another the Plaintiff has made no actionable claim by rule or law The Texas Court elaborated a vast amount of basis, discounted issues of specific Defendants' admissions, and entirely disregarded Plaintiff's law and rule cites in order to accommodate its conclusions It is an epitome of injustice that a court dismissal based on an absence of law or rule is privileged to affirmation on appeal when legitimate basis in law or rule actually was timely presented for consideration and purposefully ignored As was shown, the matter of lower court's ignoring the evidence of pertinent law and violation is beyond those court's discretion The resistance to applying the reform-law is the attractor for the appearance of a profusion of coincident anomalies heaped on this case by Defendants and courts to obfuscate those Plaintiff truths ; as was remarked, "mistakes" all made in someone else's favor, are not mistakes at all. The pattern of twisting toward that resistance

to reform is too obvious for any neutral researcher to miss accidently

In consequence of the exercise of excess court discretion in such matters, ignoring the law for political or other purposes would allow a new standard-procedure which negates the purpose of law administration for which the courts are Constitutionally Chartered in the U S Constitution. Ignoring the laws to allow a case to be proceeded in favor of a conflict-of-interest-wrongdoing is not legitimate administration , and, the absence of this Supreme Court's grant of a petition for supervision assures that such as has happened continues to happen The paragraph 4 command within P S L R.A provisions cited to this case that "any settlement" must be wrought to favor a class' interests to share and share alike, must be heeded That provision is purposefully written to restrict court discretion Therefore, this case must be seen to warrant the reasoned Opinion of a Federal Court in actual address of the cited Federal Law and not allow the present state, in which, pertinent law as was reformed by the Will of The People is to be ignored by misguided, lower-court discretion

With a consideration for the cited law actually applied, the Plaintiff's case is positively proven that "share and share alike" was not performed and that the facts of actual terms in the Dynegy Settlement were concealed Plaintiff ,thereby, concludes his case was intentionally misconstrued to avoid consequences of the reform-law violation Because the matter is focused on Defendants' mis-representation, as required commission of fraud

and malpractice to further their agenda, the actions of all others continuing that "avoidance" of reform-law application, beyond their respective authorities, appear to complete a "cover-up" for those same or different reasons , such that, a very serious circumstance has evolved for this Supreme Court's supervisory reaction, as a turning-point

3 Unauthorized Defacto Taxation by a State Entity

The University of California and, so, The Regents are a Constitutionally Chartered arm of California State government The bargaining for corporate governance measures (two Board of Directors' Seats control) by, in this case, a government entity is a dirty shortcut to government intrusion into private enterprise and wholly unwarranted creation of yet another quasi-government enterprise, albeit, this time by a State rather than federal government authority Were the taking of control by this means not of dubious legitimacy, the actual and complete terms of the settlement would more-likely have been published to the Class for consideration and not encrypted with proprietary technology The cost of that shift of control disproportionately effected a relatively small population of nationally distributed investors and non-residents of the State of California , and, further, the cost acts as an unauthorized levy of taxation There was no Federal Tax Payer basis for the grant of control, and, the desire for that California State control exists only in a greedy minority linked to the Dynegy Corporation as, thereby, a State of Texas

interest and precisely against the Class interest to maximum recovery of losses through the actions of honorable representation Plaintiff has previously reasoned that Board of Directors' seats have quantifiable value and must be bargained for by other means than at someone else's expense in a Class-Action Settlement That reasoning is here amplified to describe that non-residents of the interested States can not be subjected to any State agenda, including taxation, within a nationally-based, Federal Class-Action That reasoning remains fully-supported by the P S L R A "share and share alike" provisions cited to the case and incorporated within the required Lead-Plaintiff Sworn Certificate in recognition of the P S L R.A reformed-conduct of class representation

4. Vast Effect to "Generational Robbery" and Due Process

The matters exposed here in this case have considerable impact on an entire generation of individual investors and their retirement savings as had been mistreated first by corporations and again in resultant Class Actions and, so, required the 1995 Act of Congress to reform pertinent law As possibly this Court's first opportunity to evaluate the specific cites within P S L R A in order to interdict the conflicts-of-interest by Lead Plaintiffs with the actual interests of the Classes they represent, this Court's action is vital to consistent and determined law administration At issue in this regard is no less than the enforcement of reform law to protect the represented from abuses demonstrably visible to both Congress and the Executive The lower courts must necessarily

be held to timely adherence to the requirement to make Judicial Notice of Federal Law or deny by delay Due Process Civil Rights

Plaintiff presents his opinion, consistent with this Supreme Court's previous interpretations, that The Due Process Clause of The U S Constitution effectively defines that U S laws must be uniformly applied. Of that uniformity of law application and Due Process, both in the first instance by a court presiding over such Judgments and Settlements of Class Actions and later, as in this case, where a U S Court of Appeals has mandated a levy of costs of the defense without actually applying the pertinent law cited within Plaintiff's case, all sense of either justice or law is obliterated. Because the cited P S L R A provisions remain avoided by any overt Court Opinion to this case, the law remains un-applied and both Due Process and, thus, Plaintiff's Civil Rights have been denied.

5. Transference to a Federal Liability

It is not preferentially a responsibility of the U S Tax Payers, as effectively the obliged Defendants in a Civil Rights case for Federal Courts' failure to defend Plaintiff's Civil Rights to Due Process, especially when the clear intention of Congress in the P.S.L R.A "Sworn Certificate" provision (cited) attests to both a Class Action Lead Plaintiff knowledge of reform changes to the previous law AND hooks class-representatives and not Federal Courts or Tax Payers for damages caused by a

breach of class-representation Plaintiff has previously opined that it is a clear breach of the P.S.L.R.A provision to "share and share alike" when exclusive power and control and not the monetary damages beneficial to recompense the Class' monetary losses are bargained for by a Lead Plaintiff In that precise context it is an injustice to delay this Plaintiff's restoration forwarded to another Federal Suit and place the ultimate burden on Tax Payers not truly responsible for these Defendants' untoward greed to disproportionate benefits in the Dynegy Class Action Settlement

The effectiveness of Law Doctrine (here re-cited) endorsed by this Supreme Court, found in Table of Authorities at item 3, within

"It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime",

as applied to the Texas Court of first instance, appears in serious conflict with this Supreme Court proceeding to conclusions favoring denial of the Petition for Writ of Certiorari by a simple virtue That virtue defines any lack of regard for what Petitioner maintains was these Defendants' breach of representation (and the laws and precedents specific to accountability for breach) as an actionable lack of supervision by all the courts given an opportunity in this case So called "Governance Changes" comprising a Lead-Plaintiff's intrusion onto a Board of Directors has been rationalized as effectively a before-the-fact-

type, court of equity enjoinder of future crimes of the settling corporation resolved through a lead-plaintiff presence on the Board of Directors Since such can not, by cite above, be the true rationale, such outside-doctrine rationale is a thinly-veiled excuse to promote power-grabs of unshared! settlement considerations within class-actions. The present 5th Circuit initiative to discard Due Process and, so, effectively convert the liability to U S Tax Payers in deference to the scope of the scandal, molly-coddled the corruption and encourages it The duty of U S Courts is to the laws and not to safeguarding a privilege for elite groups to defy reform

What is Desired From The Supreme Court

This Court's Supervisory Power to see that equal justice is administered in upholding the F.R.E would seem to apply and necessitate Grant of Plaintiff's Petition for Certiorari The court should already understand the Plaintiff is not an attorney and that some leeway of expression and potential for court amendment of the Petition "as Justice so requires" applies and may be necessary

It is the desire of Petitioner that the Supreme Court reconsider the matter and grant the Writ in order that the court's well-considered opinions can be formally generated to precedent Among several reasons for such a conclusion is the need for interpretation and application of the cited provisions of reform-law within the P S L R A so that the ordeal of bringing similar matters to the

court's attention is not necessitated of a repetition at some other time by someone else

Having received no response from Defendants to the Petition for Writ of Certiorari or the issues of P.S L R.A violation at any time, it is my understanding from S.Ct Rule 44 that the temperature may be raised by a direct, court request for a response to this rehearing petition that a response to actual issues may finally be boiled out of them

Charles W. Birks 4/22/2010

Signature of Petitioner, *pro se* date

Charles W Birks
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304-577-6610

APPENDIX

Appendix Table of Contents

A. Order of Denial by Supreme Court

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B List of Citations and Orders

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-001

William K Suter
Clerk of the Court
(202) 479-3011

March 29, 2010

Mr Charles W. Birks
1586 Dry Ridge Road
Walton, WV 25286

Re. Charles W. Birks
v Keith F Park, et al.
No 09-880

Dear Mr. Birks·

The Court today entered the following order in the above-entitled case The petition for a writ of certiorari is denied

Sincerely,

s / William K Suter
William K Suter, Clerk

Citation List of Opinions and Orders to the Case

1. 11/21/2007 - Standing Order In Re Assignment And Referral Of Civil Actions To Magistrate Judges

2. 5/07/2008 - Notice And Order

3. 5/08/2008 - Order Vacating That Notice And Order of 5/07/2008

4 7/08/2008 - Proposed Findings And Recommendations

5 7/25/2008 - Order Directing Reassignment Of The Civil Action To Another Judicial Officer Of The District

6 7/29/2008 - Clerk's Order Reassigning The Civil Action From Judge Copenhaver To Judge Goodwin

7 8/19/2008 - Memorandum And Order

8 9/02/2008 - Order Denying Plaintiff's Motion To Reconsider

9. 9/08/2008 - Order Of Pretrial Conference Of The Texas U S District Court

10. 9/08/2008 - Order To Disclose Interested Persons

11 9/10/2008 - Order Concerning Removal

12. 9/25/2008 - Memorandum and Order

13. 10/15/2008 - Order Granting Motion To Transfer Case To Judge Lake

14. 11/17/2008 - Order Denying Plaintiff's Motion To Stay Pending Appeal To The 4th Circuit Court

15 1/20/2009 - Judgment Of The 4th Circuit Court As DISMISSED Plaintiff's Appeal

16 1/20/2009 - Per Curiam Opinion Supporting Dismissal Of Plaintiff's Appeal

17. 2/12/2009 - Memorandum Opinion And Order Granting Defendants' Motion For Judgment

18 2/12/2009 - Final Judgment Dismissing Plaintiff's Texas Court Action With Prejudice

19. 3/03/2009 - Order Of The Clerk As Denied Plaintiff's Petition For Rehearing En Banc In The 4th Circuit Court

20. August 27, 2009 Per Curiam Opinion of the 5th Circuit Court as Affirmed the Texas District Court dismissal

21. September 30, 2009 Order of the 5th Circuit Court as Denied both Rehearing and Rehearing En Banc petitions

22 October 5, 2009 Order of the U S Supreme Court as Denied petition for writ of mandamus and/or prohibition (docket no. 08-1549)

23 March 29, 2010 Order of the Supreme Court of the U S as Denied Petition for Writ of Certiorari (docket no 09-880)

In The Supreme Court of The United States

CHARLES W BIRKS,
Petitioner, *pro se,*

v

KEITH F PARK, Esquire , COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP , REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents

Certificate of Rule Compliance and Non-Delay Motive

Under S Ct Rule 44, Petitioner certifies that the reasons for filing the foregoing Petition for Rehearing are unrelated to the effect of delay in the implementation of the mandate for levy of defense costs or for any other reason of delay The desire remains the same as it has been, that substantive justice in the matter of Federal Law violation by Defendants be actually addressed in the courts Every effort has been made to restrict the rehearing petition to the grounds specified which are understood to include exposition of unintended/unforseen consequence as substantial or controlling elements within intervening circumstances and not previously expounded

Charles W. Birks 4/22/2010

Signature of Petitioner, *pro se* date
Charles W Birks